

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**LAUREN N. WILEY,
APPELLANT-RESPONDENT**

vs.

**RYLAND R. HOMFELD
RESPONDENT-APPELLANT**

DOCKET NUMBER WD69560(WD69599)

DATE: NOVEMBER 3, 2009

Appeal from:

Ray County Circuit Court
The Honorable Werner A. Moentmann, Judge

Appellate Judges:

Before Court En Banc: Thomas H. Newton, Chief Judge, James E. Smart, Jr., Judge, Joseph M. Ellis, Judge, Victor C. Howard, Judge, Lisa White Hardwick, Judge, James E. Welsh, Judge, Alok Ahuja, Judge, Mark D. Pfeiffer, Judge, and Karen King Mitchell, Judge

Attorneys:

Edward D. Robertson, for Appellant-Respondent

Nikki Cannezzaro, for Respondent-Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

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On May 20, 2004, Lauren Wiley was driving her Ford Escort when she was struck by an eighteen-wheel truck and trailer driven by Mr. Homfeld, who had run a red light while talking on his cellular phone. Ms. Wiley sustained injuries to her back as a result of the collision. Ms. Wiley subsequently filed a petition for damages in the Circuit Court of Ray County. At trial, Mr. Homfeld admitted liability, and the jury rendered verdict in favor of Ms. Wiley for \$400,000. Subsequently, the trial court granted Mr. Homfeld's motion for remittitur and entered a judgment in favor of Ms. Wiley for \$100,000.

Ms. Wiley appeals the circuit court's entry of remittitur and final judgment in her negligence action against Ryland Homfeld, contending that the circuit court erred because: (1) it failed to give Ms. Wiley an opportunity to consent to remittitur or to request a new trial, and (2) it abused its discretion in remitting the jury's verdict. Mr. Homfeld cross-appeals claiming that the circuit court erred in permitting Dr. John Scowley to testify regarding Ms. Wiley's future medical expenses and in denying his motion for new trial.

REVERSED.

The Court en banc holds:

- (1) Section 537.068 only vests the trial court with the discretion to remit a verdict if the evidence, viewed in the light most favorable to the verdict, does not support the amount awarded by the jury. Accordingly, when reviewing a grant of remittitur, an appellate court must first review whether the trial court had the statutory authority to remit the verdict.
- (2) The only way to review whether the trial court had the statutory authority to remit the verdict is to review the evidence in the light most favorable to the jury's verdict, as the trial court was required to do.

- (3) Properly viewed, the evidence presented at trial clearly supported the verdict rendered by the jury. Plaintiff's expert's testimony reflects that, at a minimum, Ms. Wiley will require visits to the doctor and/or chiropractor, medication, and one or more sessions of physical therapy each year and would cost, in the aggregate, a minimum of \$2,500 per year. Furthermore, the doctor's testimony indicated that she would need MRI's and epidurals at some point in the future and might require surgery. The fact that Ms. Wiley might need additional treatment and/or back surgery in the future could properly have been weighed by the jury in assessing the nature and extent of her injury as well as the pain and suffering she would experience as her condition worsened.
- (4) The trial court abused its discretion in finding that the evidence, viewed in the light most favorable to the verdict, did not support the amount awarded.
- (5) The trial court did not abuse its discretion in allowing the plaintiff's expert to testify about the future medical expenses Ms. Wiley might incur even though she failed to list such expenses in response to an interrogatory asking her to itemize any special damages. The trial court reasonably found that there was no unfair surprise since the doctor's testimony was entirely consistent with is deposition testimony.
- (6) Under Missouri case law, expert testimony is admissible where it addresses the probability, short of reasonable certainty, that future medical treatment may be necessary in order to allow the jury to better assess the nature and extent of the plaintiff's injuries.

Opinion by: Joseph M. Ellis, Judge

Date: November 3, 2009

Concurring opinion by Judge Alok Ahuja, in which the author concurs in the result.

Dissenting opinion by Judge James E. Welsh:

The author would hold that a circuit court's granting a remittitur is equivalent to granting a new trial on the ground that the verdict is against the weight of the evidence. As such, the review from the granting of a new trial should be applicable to the present case. In reviewing a grant of new trial as against the weight of the evidence, we view all inferences and evidence in the light most favorable to the circuit court's decision.

To read the statutory language of section 537.068, RSMo 2000, that "[a] court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive," as saying the court may only remit a verdict if the evidence, viewed in the light most favorable to the verdict, does not

support the amount awarded, is to do violence to the statutory language. It adds words that are simply not there. In enacting section 537.068, the legislature instructed that remittitur is proper only where "after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." The legislature did not say that the circuit court may remit a verdict if the evidence, viewed in the light most favorable to the verdict, does not support the amount awarded by the jury. The unstated result of such a review is that evidence unfavorable to the verdict is ignored. This is the antithesis of weighing the evidence. Section 537.068 merely requires the circuit court to review the evidence in support of the jury's verdict. This exercise still allows the circuit court to weigh the conflicting evidence and evaluate all of the evidence in light of its opportunity to see and hear all of the witnesses. Therefore, in reviewing the action of the circuit court, this court should not weigh the evidence but merely should examine the record to determine whether there is substantial evidence to support the circuit court's ruling. If the evidence, viewed in the light most favorable to the circuit court's ruling, affords reasonable and substantial support for the ruling, we should affirm.

The circuit court has broad discretion in ordering remittitur and ought not to be reversed except for abuse of that discretion. After a review of the record, employing the standard of review which allows the circuit court to weigh the conflicting evidence and evaluate all of the evidence in light of its opportunity to see and hear all of the witnesses, I cannot conclude that the remitted verdict is manifestly unjust. The circuit court's finding was not an abuse of discretion as reasonable minds could differ over whether the need for future medical procedures was established. That reasonable minds can differ by definition cannot be an abuse of discretion. It cannot be said that the circuit court's decision was contrary to the logic of the situation, especially when viewed in the light most favorable to the trial judge's decision.

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